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## Days Appear Numbered For Lax Online Sales Tax Collection

By **Matthew Nesto**

Law360 (February 23, 2018, 8:49 PM EST) -- Tax advisers say there's a growing awareness and concern among online sellers that the lax and sporadic sales tax collection practices of the past are over.

States have gotten more aggressive and creative at tracking down and collecting untaxed purchases. Moreover, there is an overhang effect stemming from the Supreme Court's decision in January to hear a case that could topple the standard for the taxation of remote sellers that has been in place for the past 25 years.

"There is much more awareness and a rising level of concern," said Diane Yetter, certified public accountant and founder of the Sales Tax Institute, which just hosted a seminar for online sellers titled "Sales Tax Isn't Optional."

"The states have gotten some successes and with the Supreme Court **agreeing to hear** the South Dakota v. Wayfair case, I think people are starting to think that the days of limited sales tax collection are limited," Yetter said.

As it stands, 45 states and the District of Columbia have a sales tax, while in 37 states taxes are collected by cities and counties through some 12,000 other taxing jurisdictions spread across the country. While collection, remittance and compliance have gotten better, there's still a huge sum of money left on the table.

According to a November 2017 report from the Government Accountability Office, state and local governments could gain from \$8 billion to as much as \$13 billion if they were authorized to require sales tax collection from all remote sellers, which equals about 2 percent to 4 percent of total 2016 state and local government general sales and gross receipts tax revenues.

In the past two years, several states — including Washington, Colorado and Massachusetts — have passed their own notice and reporting rules that require remote sellers with sales above a certain threshold, typically \$50,000 to \$250,000, to produce transaction records, customer information or both to the state. While actual tax collection rates are still low, these new reporting laws have the secondary effect of being more cumbersome than collecting tax, and they appear to be working.

"These rules are more onerous than just collecting," Yetter said. "I've got a number of clients that have voluntarily registered instead of complying with these rules." She noted that states had "upped their game" with technology and that marketplace providers were cooperating.

According to a column posted on Baker McKenzie's SALT Savvy blog Friday, not only do these notification requirements create a heavy compliance burden for retailers, but some states also impose significant penalties.

"This onerous combination has caused many out-of-state retailers to opt out of the use tax notification and reporting requirements by electing to collect sales tax, even if they do not have any in-state physical presence," said Baker McKenzie state and local tax attorneys John Paek and Drew Hemmings.

To be sure, the problem extends beyond the sellers themselves, as online shoppers are also said to have a stake in perpetuating the untaxed days of yore.

"There's still a belief among many consumers that they don't owe sales tax if they buy something online," said Rachelle Bernstein, vice president and tax counsel at the National Retail Federation, which has long fought to level the playing field between online and traditional storefront retailers. She said the misconception that buying online poses a tax advantage still needs to be addressed.

For its part, the NRF has expressed hope that the high court will overturn what it calls an "antiquated" online sales tax ruling, and that Congress will act too. Ahead of that, Bernstein said small and regional internet sellers are more aware that they need to register and collect.

"Whether or not they believe they have to do it, [remote sellers] are very concerned that if they don't collect from customers it will come out of their own pocket," Bernstein said, noting that it is a huge burden on a small business to be hit with a retroactive sales tax it failed to collect several years ago.

While she says most large national sellers have adopted the software needed to apply the correct sales tax, or taxes, to a purchase from a particular ZIP code and remit it to the appropriate jurisdiction, it's worth noting that the GAO report estimates the compliance cost to businesses for all this is about \$1 billion a year.

Regardless of the expense, Yetter and other tax pros say the cost of not complying is even greater, and that it's only a matter of time before nonpaying businesses or individuals get discovered.

"If you sell on a marketplace, you should be prepared to get some sort of notice," Yetter said, noting the need to review it promptly and answer it truthfully. "And you need to respond. Tossing it in the trash won't make the state go away."

--Editing by Robert Rudinger and Tim Ruel.

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